

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DALE EMERY, } No. 06-CV-0008-AAM
Plaintiff, }

v.
BIOPORT CORPORATION,
Defendant.
}
}
**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS AND DENYING
DEFENDANT'S
ALTERNATIVE MOTION TO
TRANSFER VENUE**

BEFORE THE COURT is Defendant BioPort Corporation's Motion to Dismiss for Lack of Jurisdiction or, in the alternative, Transfer Venue (Ct. Rec. 19). This matter has come on for hearing without oral argument. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants Defendant's motion and dismisses Plaintiff's complaint for lack of personal jurisdiction for the reasons discussed below.

1. BACKGROUND

Plaintiff, Dale Emery, is a resident of Washington. Emery's Complaint filed January 9, 2006, alleges personal injury due to his inoculation with anthrax vaccine while working as a merchant seaman aboard a ship under contract with the U.S. Navy. Complaint, Ct. Rec. 1. Plaintiff alleges he received the injection from a doctor with the United States Department of Defense when Plaintiff was located near Beaumont, Texas. *Id.* Defendant, BioPort Corporation (Bioport) is a Michigan corporation and

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1 is the sole manufacturer, designer, distributor, producer and seller of Anthrax Vaccine
2 Adsorbed (“AVA”). Defendant has moved to dismiss for lack of jurisdiction or, in the
3 alternative, to transfer venue to Michigan. The following are the undisputed
4 jurisdictional facts relevant to the motion.

5 Since March 2000, BioPort’s sole business (with the exception of certain
6 research and development activities) has been the manufacture and sale of AVA.
7 BioPort’s principal place of business is Lansing, Michigan, where it produces all AVA.
8 BioPort’s records and witnesses relating to production and testing of AVA are located
9 in Michigan. BioPort has never maintained an office, employee, telephone, mailing
10 address, or registered agent for service of process in Washington. BioPort does not
11 own or lease any real property in Washington. BioPort is not registered to do business
12 in Washington.

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14 *Relationship with Hollister-Stier*

15 Since 2002, Bioport has shipped all of its AVA to Hollister-Stier of Spokane,
16 Washington to have them “fill” AVA into ten-dose vials. Hollister-Stier then returns
17 the vials to BioPort in Michigan. During filling, BioPort owns the AVA possessed by
18 Hollister-Stier. BioPort’s contract with Hollister-Stier describes the relationship of the
19 parties as “independent contractors,” rather than as a “joint venture.” Zingone Dec.,
20 Exs A, B. BioPort internal documents refer to Hollister-Stier as a “vendor.” BioPort
21 employees have had various contacts with Hollister-Stier over the years. They visit
22 Hollister-Stier annually to conduct quality insurance audits, which usually last one or
23 two days. BioPort has sent employees to observe fills, to help Hollister-Stier prepare
24 for a pre-approval inspection by the Food and Drug Administration, to discuss contract
25 terms, and for “meet and greet” tours. Howell Declaration, Ct. Rec. 45 at 9-14.
26 BioPort maintains a “day to day” relationship with Hollister-Stier. *Id.*

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1 *Sales and Shipments*

2 All but a small fraction of AVA has been sold to the United States Government,
3 Department of Defense (DoD). Wibert Dec ¶6. The government mandates when and
4 where the AVA that it has purchased will be delivered. BioPort plays no part in that
5 decision-making process. BioPort stores the DoD-owned AVA pursuant to a separate
6 storage contract. At the direction of the DoD, since 1998, BioPort has made shipments
7 of 270,000 doses of AVA to entities in Washington State. The majority of shipments
8 were to military facilities. All AVA shipped to Washington State pursuant to this
9 contract was DoD-owned and delivered at DoD's request.

10 BioPort has made no direct sales of AVA to a Washington customer, although
11 recently BioPort has taken steps to begin marketing AVA to state and local
12 governments. Several meetings took place with various employees of the City of
13 Seattle in 2006 to gauge interest in such a program. BioPort has not yet made any such
14 sales.

15 *Business Relationships*

16 BioPort has entered into licensing agreements with Microsoft Corporation.
17 BioPort also entered into two contracts with CFO Services for the set up of a "financial
18 data mart." The maximum amount paid under each contract was \$3900.00. A third
19 contract was entered into with Kuhlman Technologies for technical and operational
20 evaluation of a piece of equipment. None of these contracts involved the physical
21 presence of BioPort in Washington.

22 **II. DISCUSSION**

23 Where a defendant moves to dismiss a complaint for lack of personal
24 jurisdiction, the plaintiff bears the burden of demonstrating that jurisdiction is
25 appropriate. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir.
26 2004). Plaintiff cannot simply rest on the bare allegations of its complaint, but rather
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1 is obligated to come forward with facts, by affidavit or otherwise, supporting personal
2 jurisdiction. *Amber Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784,
3 787 (9th Cir. 1977). Where, as here, the motion is based on written materials rather
4 than on evidence developed through an in-court hearing, the plaintiff need only make
5 a *prima facie* showing of jurisdictional facts. *Schwarzenegger*, 374 F.3d at 800.
6 Uncontested factual allegations must be taken as true. Conflicts between parties
7 over statements contained in affidavits must be resolved in the plaintiff's favor. *Id.* A
8 *prima facie* showing means that the plaintiff has produced admissible evidence, which
9 if believed, is sufficient to establish the existence of personal jurisdiction. *Wenz v.*
10 *Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995).

11 Where no applicable federal statute addresses the issue, a court's personal
12 jurisdiction analysis begins with the "long-arm" statute of the state in which the court
13 sits. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114,
14 1123 (9th Cir. 2002). Washington's long-arm statute provides that a person submits
15 himself/herself to jurisdiction in Washington as a result of: (a) the transaction of any
16 business within the state or, (b) the commission of a tortious act within the state. RCW
17 4.28.185(1)(a) & (b); *Shaffer v. McFadden*, 125 Wn.App. 364, 370, 104 P.3d 742,745
18 (2005). Washington's long-arm statute extends the court's personal jurisdiction to the
19 broadest reach that the United States Constitution permits. *Byron Nelson Co. v.*
20 *Orchard Management Corp.*, 95 Wn.App. 462, 465, 975 P.2d 555 (1999). Because
21 Washington's long-arm jurisdictional statute is coextensive with federal due process
22 requirements, the jurisdictional analysis under state law and federal due process is the
23 same. *Schwarzenegger*, 374 F.3d at 800-01. A court can exercise its power over a
24 non-resident defendant (absent the defendant's consent) only if it has specific or
25 general jurisdiction. *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082,
26 1086 (9th Cir. 2000).

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1 **A. Specific Jurisdiction**

2 Specific jurisdiction applies if (1) the defendant has performed some act or
3 consummated some transaction within the forum state or otherwise “purposefully
4 availed” himself of the privileges of conducting activities in the forum, (2) the claim
5 arises out of or results from the defendant's forum-related activities, and (3) the
6 exercise of jurisdiction is reasonable. *Easter v. American West Financial*, 381 F.3d
7 948, 960-61 (9th Cir. 2004). Plaintiff fails to satisfy the second prong of this test.
8 Plaintiff's injuries arise from his inoculation with AVA in Texas. There is no
9 contention the AVA was manufactured in Washington. Plaintiff's failure to discuss
10 specific jurisdiction in his supplemental opposition brief also suggests the Plaintiff has
11 abandoned this argument.

12 **B. General Jurisdiction**

13 In order for a court to exercise general jurisdiction over a nonresident defendant,
14 the plaintiff must demonstrate that the defendant's contacts with the forum state are
15 “substantial” or “continuous and systematic.” *Helicopteros Nacionales de Columbia,*
16 *S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868 (1984). “[I]n a controversy unrelated
17 to a defendant's contacts with the forum, a court may exercise general jurisdiction only
18 where ‘continuous corporate operations within a state are thought so substantial and
19 of such a nature as to justify suit against the defendant on causes of action arising from
20 dealings entirely distinct from those activities.’” *Tuazon v. R.J. Reynolds Tobacco Co.*,
21 433 F.3d 1163, 1169 (9th Cir.2006) (quoting *Int'l Shoe v. Washington*, 326 U.S. 310,
22 318, 66 S.Ct. 154 (1945)). “The standard for establishing general jurisdiction is ‘fairly
23 high,’ and requires that the defendant's contacts be of the sort that approximate
24 physical presence.” *Bancroft*, 223 F.3d at 1086. “Factors to be taken into
25 consideration are whether the defendant makes sales, solicits or engages in business
26 in the state, serves the state's markets, designates an agent for service of process, holds
27 a license, or is incorporated there.” *Id.*

1 Here, Bioport's contacts with the State of Washington do not "approximate
2 physical presence." BioPort is a Michigan corporation with no permanent physical
3 presence in Washington. BioPort has not established a regular place of doing business
4 in Washington. It is not registered as a Washington business, it does not maintain a
5 Washington office, and it has not sold AVA to any Washington consumers. Because
6 BioPort is not incorporated in Washington, is not licensed or authorized to do business
7 there, does not have offices, property, or employees there, and does not pay taxes,
8 advertise, or make sales in Washington, BioPort's contacts with Washington are not
9 sufficiently "continuous and systematic" to support general jurisdiction. *See*
10 *Helicopteros*, 466 U.S. at 416; *Omeluk v. Langsten Slip & Batbyggeri A/S*, 52 F.3d
11 267, 270 (9th Cir. 1995)(lack of a regular place of business in forum state is significant
12 and is not overcome by a few visits to the forum).

13 While the absence of these general business contacts has the most bearing on
14 this decision, the Court recognizes that the minimum contacts analysis entails more
15 than a mechanical application of these jurisdictional factors alone. The Court must
16 balance the totality of the contacts and also other indicia of presence, including
17 "longevity, continuity, volume, economic impact, physical presence, and integration
18 into the state's regulatory or economic markets." *Tuazon*, 433 F.3d at 1172. The Court
19 has specifically considered the nature and extent of BioPort's contractual relations with
20 Washington entities, including Microsoft Corporation, CFO Services, Kuhlman
21 Technologies, and Hollister-Stier. The fact that BioPort has entered into agreements
22 with resident third parties does not by itself give rise to general jurisdiction. The Ninth
23 Circuit has made a point of differentiating between doing business in the forum and
24 doing business *with* the forum state; the latter generally does not give rise to general
25 jurisdiction "because engaging in commerce with residents of the forum state is not in
26 and of itself the kind of activity that approximates physical presence within the state's
27 borders." *Bancroft*, 223 F.3d at 1086 (concluding that defendant's license agreements
28 with two television networks and a handful of California vendors constituted doing

1 business with California and not in California). Therefore, doing business “with”
 2 Washington, even if done systematically and continuously, is not sufficient to confer
 3 general jurisdiction.

4 Taken together, BioPort’s agreements with these Washington entities constitutes
 5 doing business *with* Washington entities rather than doing business *in* Washington.
 6 Only BioPort’s contract with Hollister-Stier for the filling of vials involves any
 7 significant contact with this forum beyond the mere fact of contracting. Notably, the
 8 Court recognizes BioPort has continuously shipped *all* of its AVA into Washington
 9 pursuant to this contract. The purpose of BioPort’s contract with Hollister-Stier was
 10 for services to be performed by Hollister-Stier in Washington. Moreover, the record
 11 evidences BioPort’s supervision of Hollister-Stier’s performance and at least annual
 12 visits to Washington by BioPort employees. BioPort’s relationship with Hollister-Stier
 13 is a substantial business contract which contemplates a manufacturing component
 14 based in Washington.

15 While the nature of BioPort’s ongoing commercial contact with Hollister-Stier
 16 demonstrates a kind of ‘purposeful availment,’ *Burger King Corp. v. Rudzewicz*, 471
 17 U.S. 462, 476-77, 105 S.Ct. 2174, 2184 (1985), similar to that necessary for the
 18 exercise of limited or specific jurisdiction¹, it is not enough to establish general
 19 jurisdiction. Commercial contact absent other indicia of corporate presence is typically
 20 not sufficient to establish general jurisdiction. *See Helicopteros Nacionales de*

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22 ¹ *See Watlow Elec. Mfg. Co. v. Patch Rubber Co.*, 838 F.2d 999 (8th
 23 Cir.1988)(specific jurisdiction was proper where a corporation sent materials into
 24 the state for manufacture); *In- Flight Devices Corp. v. Van Dusen Air, Inc.*, 466
 25 F.2d 220, 227 (6th Cir. 1972) (“Van Dusen entered into contract negotiations
 26 involving a substantial order for the manufacture of goods with a firm which it
 27 necessarily knew was based in Ohio and had its production facilities located within
 28 that State. That the making (and breaking) of a contract with the Plaintiff would
 have substantial consequences in the State of Ohio is a reality of which Defendant
 could not have been ignorant”).

Colombia, S.A. v. Hall, cited *supra* (no general jurisdiction where Colombian corporation repeatedly purchased helicopter parts in Texas and sent employees there for training, but did not have offices, agents, employees or a license to do business there). Similarly, the fact that BioPort sends employees for visits to Washington, even if occurring on regular intervals, does not warrant the inference that BioPort is “present” in Washington. *Helicopteros*, 466 U.S. at 417. The commercial contacts in the present case tie BioPort to Hollister-Stier, but not to the State of Washington.

The Court has also considered the fact that BioPort's agreement with Hollister-Stier contemplates BioPort's shipment of bulk quantities of AVA into Washington. In addition, pursuant to its contract with the DoD, BioPort has shipped 270,000 DoD-owned doses of AVA into Washington at the instigation of the DoD. It is significant that these shipments were made pursuant to BioPort's contractual obligations with third parties and not as a result of solicitation of sales in Washington. *C.f. Paradise Motors, Inc. v. Toyota De Puerto Rico Corp.*, 314 F.Supp.2d 495 (D.V.I. 2004) (Japanese automobile manufacturer was subject to general personal jurisdiction even though manufacturer did not have business license, where manufacturer shipped vehicles purchased by regional subsidiary directly to dealership for over 25 years, shipped product literature written in English because regional subsidiary only offered such literature in Spanish, sent sales representatives to Virgin Islands to visit dealership's business to ensure that vehicles were not being shipped to United States for resale in violation of territorial sales agreements, and received profit share of \$2 million average annual sales of its vehicles in Virgin Islands). While BioPort's shipment of products to Washington occurs with some frequency, this activity is qualitatively equivalent to doing business *with* Washington. It is not sufficiently substantial in nature so as to equate to corporate presence *in* Washington.² Again,

² Plaintiff argues BioPort should expect to be haled into Washington courts because it transports dangerous material using Washington roadways for handling

1 BioPort's shipment of AVA into Washington has nothing to do with the injuries
2 alleged in this case. BioPort's contacts with Washington are not so substantial as to
3 justify suit in Washington against BioPort on a cause of action arising from dealings
4 entirely distinct from these contacts.

5 General jurisdiction only exists when a "defendant's contacts be of the sort that
6 approximate physical presence." *Bancroft*, 223 F.3d at 1086. The level of contact
7 required to establish general jurisdiction is high; the Ninth Circuit has declined to find
8 general jurisdiction even when the defendant's contacts with the forum were "quite
9 extensive." *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d 848, 851 n.3. (9th
10 Cir. 1993)(citing cases). The Court finds the various contacts here, collectively³, do
11 not rise to this standard. While it is perhaps true BioPort has "stepped through the
12 door, there is no indication that it has sat down and made itself at home." *Glencore*,
13 284 F.3d at 1125 (holding that there was no general jurisdiction where a defendant's
14 only contacts with California amounted to sixteen shipments of rice sold through an
15 independently employed sales agent).

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17 C. Dismissal or Transfer

18 The issue that remains is whether to dismiss the case or transfer it to a judicial

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20 by Washington residents working for Hollister-Stier. Supplemental Opposition,
21 Ct. Rec. 44 at 8. There is no evidence in the record regarding the hazards posed by
22 the shipment or handling of AVA. In any case, while the hazardous nature of a
23 product might be a factor considered in the evaluation of the reasonableness of the
24 exercise of specific jurisdiction, it does not seem relevant to the assessment of
25 whether BioPort's corporate contacts satisfy the "continuous and systematic"
standard for general jurisdiction.

26 ³ The Court has also considered BioPort's limited contact with the City of
27 Seattle for the purpose of gauging the city's interest in AVA. This falls far short of
28 the level of "continuous and systematic" activity necessary to establish general
jurisdiction.

1 district that would have personal jurisdiction over the parties. 28 U.S.C. § 1631 (upon
2 finding jurisdiction is lacking, the district court “shall, if it is in the interest of justice,
3 transfer [the action] to any other such court in which the action . . . could have been
4 brought at the time it was filed”). BioPort has alternatively requested this case be
5 transferred to the Western District of Michigan. Oftentimes, a plaintiff makes a motion
6 to transfer as an alternative to complete dismissal if the court fails to find jurisdiction
7 over the defendant. In this case, however, the Plaintiff opposes transfer and would
8 prefer dismissal of the case.⁴ Supplemental Opposition Memo., Ct. Rec. 44 at 10. As
9 such, there is no purpose in forcing the Plaintiff to litigate its claim in another court.
10 The Court will honor Plaintiff’s choice and dismiss the case.

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12 **IV. CONCLUSION**

13 BioPort lacks sufficiently substantial, continuous and systematic contacts with
14 this forum so as to create a basis for general jurisdiction over it. Accordingly, the

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24 ⁴ The Court notes that Plaintiff’s initial memorandum opposed the request
25 for transfer to Michigan and instead requested the Court transfer the action to
26 “another district,” but did not identify which district that should be. Plaintiff also
27 noted a concern with the statute of limitations. However, in Plaintiff’s most recent
28 filing, he indicates he would prefer a dismissal so that he may seek review through
an appeal. Supplemental Opposition Memo., Ct. Rec. 44 at 10. The Court assumes
this is the Plaintiff’s current position.

1 Court **GRANTS** BioPort's Motion to Dismiss for Lack of Personal Jurisdiction (Ct.
2 Rec. 19). BioPort's alternative Motion to Transfer Venue (Ct. Rec. 19) is **DENIED**.
3 Plaintiff's complaint is **DISMISSED** without prejudice.

4 **IT IS SO ORDERED.** The Clerk of the Court is directed to enter Judgment in
5 favor of BioPort, forward copies of this Order to counsel for the parties, and **CLOSE**
6 the file.

7 DATED this 31st day of October, 2006.

8
9 s/ Alan A. McDonald
10 ALAN A. McDONALD
SENIOR UNITED STATES DISTRICT JUDGE